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Nos. 88-515, 88-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Central District of California

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION

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MOTION FOR LEAVE TO FILE BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION

The United States Catholic Conference ("Conference") respectfully moves this Court for leave to file the appended brief as *amicus curiae* in support of the federal governmental parties in these consolidated appeals. The Acting Solicitor General of the United States has given his consent to the filing of this brief. Sable Communications of California, Inc. has refused, without explanation, thus necessitating this motion.

All active Catholic Bishops in the United States are members of the Conference, a non-profit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, communications, and the economy. The Conference is a frequent participant in Federal Communications Commission ("FCC") proceedings in support of the public's interest in broadcast regulation. It supported the legislation under review here.[1] When permitted by Court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States.

These appeals involve an issue of first impression for the Court—whether to extend its holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), upholding broadcast restrictions on indecent speech to novel telephone technology spreading even more insidious indecency.[2] Although the very idea that the government may regulate or ban the content of telephone communications is anathema to some, careful review of the technological form and intentions of the purveyors of the communication will reveal marked differences. The choice by Con-

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[1] In their recent statement, "Political Responsibility: Choices for the Future," p. 21 (Sept. 1987), the Bishops of the Conference's Administrative Board stated: "We support reasonable and constitutionally acceptable regulation to limit the distribution of indecent, pornographic, or sexually explicit materials through the electronic media, including the telephone, so that they are not accessible to minors."

[2] In one of its two holdings, the district court invalidated the ban on indecent speech and the FCC appealed (No. 88-525). It also upheld the ban on obscene speech and Sable Communications appealed (No. 88-515). Although this *amicus* supports both aims of the statute, 47 U.S.C. § 223(b), this presentation is limited to the issue of Congress' legislative and constitutional authority over indecent speech.

gress to ban transmission of sexually explicit monologues by the telephone comes after much debate and respects a longstanding prudential consensus that children and adolescents, and their famiiles, deserve special protection.

It is the Conference's belief that the proper resolution of this case will be assisted through consideration of both (1) the role of the Congress and the Federal Communications Commission and (2) the precise technological innovation presented by access to dial-a-porn services, a particular challenge to the regulatory flexibility inherent in broadcast authorities. Although the United States is expected to deal with the detailed legislative process and other statutory and constitutional issues, the Conference will offer its own and unique perspective on the above two issues. Thus, the Conference will not duplicate the approach of the party it supports but amplify vital constitutional and regulatory matters.

Respectfully submitted,

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February 22, 1989

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION

INTEREST OF AMICUS

All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a non-profit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, communi-

cations, and the economy. The Conference is a frequent participant in Federal Communications Commission ("FCC") proceedings in support of the public's interest in broadcast regulation. It supported the legislation under consideration here. When permitted by Court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States.

These appeals involve an issue of first impression for the Court—whether to extend its holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), upholding broadcast restrictions on indecent speech to novel telephone technology spreading even more insidious indecency. Although the very idea that the government may regulate or ban the content of telephone communications is anathema to some, careful review of the technological forms and intentions of the purveyors of the communication will reveal marked differences. The choice by Congress to ban transmission of sexually explicit monologues by the telephone comes after much debate and respects a longstanding prudential consensus that children and adolescents, and their families, deserve special protection. Unless reversed, the district court's conclusion that such a statute is impermissible will hamper effective regulation of and expose young Americans to continued indecent speech.

SUMMARY OF ARGUMENT

In the last decade there has been a remarkable growth in new electronic technology. Americans can send and receive information in various forms and of varying content in ways not previously imaginable. We link computer terminals in our homes to others thousands of miles away, may receive over a hundred television stations on a cable or by way of satellite dish, and access an unprecedented array of "services" by our telephones. One of the main growth industries in telephone services

has been sexually explicit and suggestive, even obscene, monologues designed to arouse and excite the dialers. These "services," known as dial-a-porn, are prerecorded and "sold" to a caller for a price. Even when unavailable through local telephone outlets, they can be accessed, 24 hours a day, 7 days a week by long distance from any part of the country and constitute a large number of the telephone calls made in many areas of the country.

The technological innovation of premium services is such that they can handle many thousands of calls simultaneously. Instead of being a one-on-one dialogue communications, these services resemble small radio or television outlets for those who access them. *Carlin Communications v. Mountain States Telephone and Telegraph*, 827 F.2d 1291 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1586 (1988). According to Congressional testimony, callers frequently include adolescents or children.[1] This phenomenon has created more than a little concern among parents, educators, medical professionals, and legislators and regulators. Many various approaches have been attempted to limit this access without apparent success.[2]

The Congress and the courts have long understood the need to protect adolescents, who incompletely grasp the full consequences of their actions, from access to such material, both in print and in the media. *New York v. Ferber*, 458 U.S. 747 (1982); *FCC v. Pacifica Foundation, supra; Ginsberg v. New York*, 390 U.S. 629 (1968). Last Term in *Thompson v. Oklahoma*, 108 S.Ct. 2687

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[1] *Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, (hereinafter "*Telephone Decency Hearings*"), 100th Cong., 1st Sess. 11 (statement of Rep. Bliley); *Id.* at 18 (statement of Rep. Coats); 134 Cong. Rec. H1690 (daily ed. April 19, 1988) (statement of Rep. Hall).

[2] The FCC rulemakings attempting to craft effective restrictions are listed *infra* at note 16.

(1988), involving the imposition of the death penalty on juveniles, a plurality recited the myriad ways that society attempts to enforce those protections through law. Some of these, like restrictions on the right to vote, marry, or contract, respect the relative immaturity of the adolescent until such time as he or she is better able to exercise these choices. Others, like parental notification in abortion or consent for health care, operate to strengthen the fundamental and constitutionally protected role of parents in the formation, nurture, and education of their offspring. Restrictions on access to sexually explicit and suggestive material reflect both concerns.

In 1983, Congress attempted to mandate a set of controlled access to dial-a-porn that it hoped would stop receipt of such material by adolescents and children. Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8(b), 97 Stat. 1470 (1983) (enacting 47 U.S.C. § 223(b)). In 1987 and 1988, Congress undertook a comprehensive review of dial-a-porn purveyors and responded to concerns about access by children and adolescents. Faced with evidence that regulatory attempts were failing, Congress enacted a comprehensive ban. Telephone Decency Act, 47 U.S.C. § 223(b) *as amended* (Pub. L. No. 100-297, § 6101, 102 Stat. 424 (1988)). Given Congress' historic role as a broadcast and telecommunication regulator, the legislative record, and its active consideration of the legal opinion on both sides of the issue, its solution was hardly unreasonable and entitled to deference by the courts. *Rostker v. Goldberg*, 453 U.S. 57 (1981). Because of the marked similarities between the novel dial-a-porn services and broadcast, Congress infringed no constitutional prohibitions in seeking to extend protections available to families and children in the broadcast context to dial-a-porn. *FCC v. Pacifica Foundation*, 438 U.S. at 748-50.

In invalidating the ban on indecent (but not obscene) speech, the district court did not adequately weigh the

Congressional record, the role of the Congress, or the technological facts. *Sable Communications of California v. FCC*, 692 F. Supp. 1208, 1209 (C.D.Cal. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1989) (Nos. 88-515, 88-525).[3] It did not explore the precise nature of dial-a-porn and compare or contrast it to other forms of broadcast. 692 F. Supp. at 1209. It rather expressed its disapproval solely because Congress enacted a ban that prohibited access to all sexually explicit monologues by way of the telephone in order to protect adolescents and children. It likewise did not believe itself empowered to apply *FCC v. Pacifica Foundation* to this case. In so doing, the district court avoided any studied consideration of the other competing, constitutionally significant interests. Unless reversed, its judgment reopens the door to access and consequent harm to this country's youth.

ARGUMENT

I. CONGRESS' DECISION TO ELIMINATE DIAL-A-PORN FROM TELEPHONE TRANSMISSION MECHANISMS IS REASONABLE AND ENTITLED TO DEFERENCE.

A. Congress Reasonably Attempted to Regulate a Harmful Use of a New Technology.

In the last decade, consumers have been able to receive more from their telephone company than traditional telephone connections to other persons with telephones for one-on-one conversations. Consumers are able to use their telephone to call numbers, usually offered on an exchange with a 976-prefix, which trigger recorded mes-

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[3] In one of its two holdings, the district court invalidated the ban on indecent speech and the FCC appealed (No. 88-525). It also upheld the ban on obscene speech and Sable Communications appealed (No. 88-515). Although this *amicus* supports both aims of the statute, 47 U.S.C. § 223(b), this presentation is limited to the issue of Congress' legislative and constitutional authority over indecent speech.

sages on topics such as sports, weather, and health. There is no conversation; the receiver listens to the message monologue. One type of recorded message "service" offers recordings of persons, usually women, graphically describing sexual intercourse and other explicitly sexual activity, a "service" commonly known as dial-a-porn. No mere titillation, these recordings feature throaty-voiced women describing sexual activity with groups and animals, violence directed towards them (such as rape), and similar actions. *See* FCC Jurisdictional Statement, p. 5. As with other recorded message services, the same 976 number may play its recording to over 50,000 callers per hour,[4] and to over 7,900 persons at the same time.[5] The supplier of the dial-a-porn message subscribes to the telephone company's dial-it network, and specifies the price to be paid per call. The telephone company bills each caller, keeps a portion for itself, and the dial-a-porn provider receives the remainder.[6] The greater the number of calls, the more the purveyor earns.

Measured by the number of calls, dial-a-porn has been a great financial success. From its beginnings as one number on the New York Telephone Company dial-it network offered by Carlin Communications, dial-a-porn numbers offered by many companies have spread to five of the seven major telephone companies.[7] Dial-a-porn vendors have made as much as $10,000 per day.[8] The

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[4] *Carlin Communications v. FCC*, 749 F.2d 113, 114 (2d Cir. 1984) (*Carlin I*), *cert. denied*, 109 S.Ct. 305 (1988).

[5] *Carlin Communications v. FCC*, 787 F.2d 846, 850 (2d Cir. 1986) (*Carlin II*), *cert. denied*, 109 S.Ct. 305 (1988).

[6] *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 56 Rad. Reg. 2d (P&F) 49, 50 n.6 (1984); *Carlin Communications v. Mountain State Telephone & Telegraph*, 827 F.2d 1291, 1293 (9th Cir. 1987).

[7] *Telephone Decency Hearings* at 11 (statement of Rep. Bliley).

[8] 56 Rad. Reg. 2d, *supra*, at 50 n.6.

popularity of dial-a-porn numbers at times exceeded the popularity of any other dial-it message service.[9] Dial-a-porn calls constitute almost a quarter of the calls made to Bell Atlantic's 976 numbers, almost thirty percent of Pacific Telesis' 976 numbers, and fifteen percent of NYNEX's 976 numbers.[10]

As the popularity of dial-a-porn grew, so has awareness of the alarming trend of attractiveness and availability of dial-a-porn to children and adolescents. Dial-a-porn businesses have aggressively marketed their numbers to the widest possible public, using indiscriminate methods. They leaflet neighborhoods, place fliers on windshields, advertise in magazines, and place advertising cards in magazine racks.[11] This marketing strategy has paid off for dial-a-porn vendors by securing a huge immature market, which avidly calls dial-a-porn numbers. While the nature of the mechanism precludes identification of the caller as adult or child, Congress has determined from testimony delivered at hearings,[12] and information supplied by angry constituents[13] that large numbers of children call these salacious messages. Congress determined that exposure to these sexually explicit mes-

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[9] *Carlin Communications v. FCC*, 837 F.2d 546, 550 (2d Cir. 1988) (*Carlin III*); *Carlin I*, *supra* at 114-15.

[10] This information was provided to Representative Bliley by telephone companies, during the consideration of the amendment under review here. It was provided to this *amicus* by his office.

[11] 134 Cong. Rec. H1699 (daily ed. April 19, 1988) (statement of Rep. Coats); *Telephone Decency Hearings* at 100 (1987) (testimony of Dar Vander Ark, President, Michigan Decency Action Council, Inc.).

[12] *Telephone Decency Hearings* at 18 (statement of Rep. Coats); *Id.* at 14, 15 (statement of Rep. Bliley); 134 Cong. Rec. H1699 (daily ed. April 19, 1988) (statement of Rep. Hall) and H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley).

[13] *Telephone Decency Hearings* at 11 (statement of Rep. Bliley).

sages was harmful to the physical, mental, and moral well-being of children.[14]

Children's access to dial-a-porn has continued unabated since 1983, when efforts began both in Congress[15] and at the FCC[16] to restrict minors' access to dial-a-porn. In spite of these time-consuming and well-intentioned efforts, by 1987 when Congress again held hearings to study dial-a-porn, it found that child access remained a disturbing reality.[17] The reach of dial-a-porn was so troubling that at the end of the 1987 hearings, Congress launched a further study of technological methods of limiting access to dial-a-porn to adults. None were found that would preclude access by children.[18] The only viable solution in Congress' view was to amend section 223 to eliminate dial-a-porn from the telephone network.[19] Its amendment of section 223 passed by an overwhelming majority in both

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[14] 134 Cong. Rec. S4377 (daily ed. April 20, 1988) (statement of Sen. Hatch); *Telephone Decency Hearings* at 15 (statement of Rep. Nielson).

[15] Pub. L. No. 98-214, § 8(b), 97 Stat. 1470 (1983) (enacting 47 U.S.C. § 223(b)).

[16] *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 FCC Rcd 2714 (1987); *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order*, 50 Fed. Reg. 42699 (1985); *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 49 Fed. Reg. 24996 (1984).

[17] *Telephone Decency Hearings* at 28 (statement of Rep. Rinaldo); *Id.* at 12, 13 (statement of Rep. Bliley); *Id.* at 131 (testimony of William Swindell, President, Citizens for Decency Through Law).

[18] 134 Cong. Rec. H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley).

[19] 134 Cong. Rec. H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley); H1690 (daily ed. April 19, 1988) (statement of Rep. Hall); S4377 (daily ed. April 20, 1988) (statement of Sen. Hatch).

houses of Congress. The Senate passed the amendment by a vote of 88-0. 133 Cong. Rec. S17048 (daily ed. Dec. 2, 1987). The House passed the amendment by 380-32. 134 Cong. Rec. H1702-H1703 (daily ed. April 19, 1988). Pub. L. No. 100-297, § 6101, 102 Stat. 424 (1988).

B. Restriction of Dial-A-Porn Respects the Immaturity of Children and Strengthens Their Parents' Roles.

This Court always has taken special care to recognize and support legislative choices that safeguard the mental, physical and moral well-being of children. In a line of cases the Court has upheld, against constitutional challenge, restrictions placed on juveniles to protect their welfare from harm at the hands of adults. *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (broadcast indecency); *Ginsberg v. New York*, 390 U.S. 629 (1968) (adult magazines); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (labor). Only last Term, the Court expounded upon the necessity for society to accommodate a basic distinction between adults and children. *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988) (plurality). This Court rested its holding in *Thompson*, in large part, on the belief that legislators should expressly reconsider the capacity of juveniles to understand their crimes and be punished by death as would adults. The plurality recognized that minors have only a reduced capacity to appreciate the consequences of their actions and to weigh the relative values of immediate gratification and approval against long-term harm.

Congress' judgment that minors should be protected from the effects of salacious material available to them by dialing the dial-it number is consistent with the Court's judgment as to minor's responsibility in *Thompson*. *See id.* at 2698-2699. Even in that case, where the end result of the minor's actions was a sadistic murder, the plurality acknowledged that a minor's moral and

intellectual development is incomplete and rudimentary. It is appropriate that society recognizes these inherent limitations by attaching a lesser level of culpability to a minor's actions so that a sixteen-year-old cannot be required legally to weigh and balance the harm which may come to him or her as a result of committing a serious crime. *Id.* at 2692-2693 and n.23. If the legislature cannot place that burden on even older minors who commit violent crimes, surely it is reasonable for Congress to judge that adolescents and the very young, who necessarily understand the workings of a telephone, cannot be left to weigh for themselves whether to risk psychological harm by dialing a dial-a-porn number.

Although laws have operated in the sensitive area of constitutionally protected rights, this Court has upheld legislation "aimed at protecting the physical and emotional well-being of youth." *New York v. Ferber*, 468 U.S. at 757. In *Ferber*, New York state made its legislative determination that even non-obscene (as defined by *Miller v. California*, 413 U.S. 15 (1973)) pornographic materials using children as subjects is harmful to the physiological, emotional and mental health of children. The Court held that the determination "easily passes muster under the First Amendment." *New York v. Ferber*, 458 U.S. at 758. Even when the ability of adults to sell erotic, non-obscene print material is affected, this Court has approved legislation prohibiting such sales to minors. *Ginsberg v. New York, supra.* The legislative judgment that exposure to non-obscene, but pornographic materials "[impairs] the ethical and moral development of our youth and is a clear and present danger to the people of the state" was held to be a rational and sustainable means of "safeguarding such minors from harm." *Id.* at 641.

The Court sustained that legislative judgment even though it expressed doubt that the legislature's finding of harm "expresses an accepted scientific fact." *Id.* at

641. It was enough that a legislature reasonably could determine that "minors' reading and seeing sex material" is "harmful." *Id.* Legislators need not postpone action until they amass scientifically certain data on which to base legislation.[20] Congress could not, and need not, have done so in the case of dial-a-porn. It was sufficient that the Congress received and considered evidence of harm to children caused by listening to dial-a-porn.[21] *Cf. Ginsberg*, 390 U.S. at 641. Given the nature of the sexually explicit service and the consequent harm to children, the failure of alternative measures to stop the harm, and the role of the Congress in protecting children, Congress acted reasonably in enacting a dial-a-porn ban.

Of equal importance in understanding the Congressional action is a desire to protect the fundamental interest of parents in inculcating the values of their children. *Telephone Decency Hearings* at 1 (statement of Rep. Markey). This Court has found the "natural duty of the parent" to educate his or her children to be part of the fourteenth amendment liberty interest in marriage, establishing a home, and raising children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923). Parental nurture and direction of children is not just a "right" but a "high duty." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *see Prince v. Massachusetts*, 321 U.S. at 166. In *Ginsberg v. New York*, 390 U.S. at 639, this Court stated that it:

> has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society. [quotation from *Prince v. Massachusetts* omitted]. The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled

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[20] *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911).

[21] Certainly the record in this case supports a finding that harm follows from exposure to explicit material. FCC Jurisdictional Statement at 21, n.14.

> to the support of laws designed to aid discharge of that responsibility.

The "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). The legislation under review here precisely and reasonably supports that tradition.

II. THE CONGRESSIONAL JUDGMENT TO BAN DIAL-A-PORN, AN EXERCISE OF TRADITIONAL BROADCAST REGULATORY AUTHORITY, IS CONSISTENT WITH THE FIRST AMENDMENT.

The Court has long recognized that each medium of expression presents special first amendment problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503 (1952). The dial-it transmission mechanism of pornography presents such a special problem. For purposes of first amendment analysis, the critical factor is the similarity to regulated broadcasting (radio and television) exhibited by the technology that distinguishes it from forms of communication that may not be subject to these same restrictions. It is still, however, a case of first impression and one that implicates the extent to which Congress can expand or contract its traditional role to coincide with technological innovations. Certainly it (and the FCC) must possess the flexibility to account for these changes. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). When also considered in light of the record of harm to children caused by exposure to these messages (note 21, *supra*), a limited extension of the reasoning of *FCC v. Pacifica Foundation* to dial-a-porn transmitted over dial-it services is entirely appropriate and constitutional.

In *FCC v. Pacifica Foundation*, the FCC prohibited broadcast indecency at times when children were reasonably likely to be in the audience. The Court determined that the attributes of intrusiveness, pervasiveness, and

unique accessibility to children made over-the-air radio and television broadcasting a transmission medium where offensive expression could appropriately be restricted "at its source." 438 U.S. at 748-49. The Court defined indecency as patently offensive words dealing with sex and excretion, and determined that such utterances, while not absolutely outside the scope of first amendment protection, are protected only in certain contexts. *Id.* at 745-748. Considering the compelling governmental interest in protecting children from such language and in protecting parents' claim to authority in their household (*id.* at 748-50), the Court affirmed that the broadcast of indecency when children are reasonably likely to be exposed to it, may be substantially regulated without fear of constitutional infringement. The Court noted approvingly that unregulated sources, bookstores and movie theaters, may be obliged to screen children and adolescents from prospective buyers and audiences and therefore avoid restricting indecent material at its source. *Id.* at 749. The Court stated, however, that its holding was narrow and reflected the special nature of broadcast media and the prospective audience. *Id.* at 750. *See Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983).

A. The Exercise of Broadcast Regulation Over Sexually Explicit Monologues is Constitutional.

The *Pacifica* holding is not on all fours with the instant case. The telephone technology is normally subject to commercial but not content regulation. Indeed the expectation of privacy in such conversations is great and subject to violation at the instance of the government only in the most narrow and compelling circumstances. *E.g., Katz v. United States*, 389 U.S. 347 (1967) (requiring search warrant for telephone conversation interception). Similarly, the possession of even obscene material in one's home, which can be banned in the mails and subject to other restrictions, is given constitutional protection. *Compare Stanley v. Georgia*, 394 U.S. 557

(1969) *with United States v. Reidel*, 402 U.S. 351 (1971). An approach to content-based restrictions on one's telephone, under this Court's jurisprudence, must be careful and tailored to achieve compelling interests. If the instant case were solely about a ban on privately initiated and received adult conversation, on a one-to-one basis, like ordinary dialogue communications, it would present a difficult situation, absent some illegality. That is not this case, which involves widely disseminated, sexually explicit monologues, available to children.

In several important respects, telephone dial-a-porn offered on a dial-it network resembles the broadcasting of indecency by radio or television. Like broadcasting, the telephone service is available by purchase of a receiver. Like broadcast licensees, telephone service providers are licensed to use the public airwaves to provide service. In fact, telephone service has "established a uniquely pervasive presence in the lives of all Americans," (*cf. FCC v. Pacifica Foundation*, 438 U.S. at 748), to an even *greater* extent than broadcasting. Telephones are available in 93.6 percent of all American households. FCC News Release, FCC No. 1206 (Jan. 13, 1989). Telephones are considered a necessity for Americans by Congress and its expert telecommunications agency, the FCC. *See* 47 U.S.C. § 1. Subsidies are available to persons who cannot afford telephones to enable them to acquire a telephone. *Access Charges (Lifeline Assistance Adoption)*, 59 Rad. Reg. 2d (P&F) 634, 638 (1985); *see* H. Res. 351, 100th Cong., 2d Sess., 134 Cong. Rec. H9671 (1988). Telephones, then, are pervasive to a greater degree than are televisions or radios. Indeed, their presence in households is actively encouraged by the government, in contrast to radio and television.

Another significant broadcast-type feature of dial-a-porn is that it is truly a *broad-based* transmission—over 7,900 people may listen simuitaneously to one message. *Carlin II*, 787 F.2d at 850. Indeed mass access is how

revenue is apparently generated. The more people who may access this "service," the greater the return to the purveyor. Like broadcast outlets, dial-it services are widely and aggressively advertised. The marked similarity to broadcasting was noted by the Ninth Circuit. "Under these circumstances the telephone is serving as a medium by which Carlin broadcasts its messages. The phone company resembles less a common carrier than it does a small radio station." *Carlin Communications v. Mountain State Telephone and Telegraph Company*, 827 F.2d at 1294.

Finally, measured by the FCC definition of broadcasting, dial-a-porn could and should be classified as broadcasting. The FCC defines as broadcasting: technologies that transmit signals that the sender intends to be received by the general public, and that is receivable without special equipment (aside from the receiver) or establishment of a subscription arrangement (as is necessary for access to cable television), or both. *Report and Order Subscription Video*, 2 FCC Rcd. 1001 (1987), *aff'd, National Association of Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). Plainly the sender intends that the public access its monologues, as discussed above. No prior subscription arrangement is required, only a telephone. Thus it is within the FCC definition of broadcasting.

Some argue that the application of broadcasting rules is inapposite because dial-a-porn could be "managed." Sable Communications Motion to Dismiss or Affirm In Part, at 6. Under the previous version of section 223, transmission of dial-a-porn was permitted if a blocking technology was employed to attempt to prevent access to persons under 18. 47 U.S.C. § 223(b), Pub. L. No. 98-214, § 8(b) (1983). The blocking mechanism feature arguably was similar to the lockbox mechanism available for cable decoders, that allows parents to lock out access by their children from unsupervised viewing. In this

way some would argue that dial-a-porn could not be deemed "uniquely accessible to children," and not subject to the rationale of *FCC v. Pacifica Foundation*. Thus, it is argued that dial-a-porn is like "cable television," which some courts have distinguished from the broadcast outlets for purposes of regulation.[22] This Court has not addressed the issue and its merits need not be here. To the extent this Court chooses to examine the matter, further analysis of the analogy yields that it is inapposite to the instant case: dial-a-porn is distinguishable and subject to regulation.

The availability of cable technology does not automatically bring indecent material into the home. Cable does not intrude on the home; it must be invited. Cable signals are not available merely by purchasing a television. A subscription agreement must be made between the cable operator and subscriber before signals may be received, and the agreement must be renewed by monthly payments to the cable operator. *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167-69 (D. Utah 1982). Further, channels which offer "adult-oriented" material may only be obtained by payment of an additional fee and the making of an additional contract by an adult. "Parents decide whether to select supplementary

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[22] Lower courts have distinguished the transmitting mechanism of cable television from broadcasting for the purpose of determining if indecency constitutionally may be prohibited, and have held that, *in that context*, indecent speech is entitled to greater first amendment protection. *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *HBO v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982). The two characteristics of broadcasting relevant to granting indecency lesser first amendment protection when broadcast—pervasiveness and unique accessibility to children—were not found in the cable medium. *Cruz v. Ferre*, 755 F.2d at 1420-21; *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. at 1167-69. This *amicus* takes no position on the merits of these conclusions which are, in any event, not material to the disposition of the instant case.

programming services such as HBO." *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985). Lockboxes are available free of charge to a cable subscriber. *Id.* at 1421. That the burden is on the subscriber to install a lockbox to block certain easily identifiable channels is not unreasonable, given that the subscriber himself "invited" those channels into his home in the first place.

On the other hand, while cable and particular selections must be chosen before a home is given access and the choice is subject to monthly renewal, dial-a-porn is available to a home entirely without any affirmative action on the part of the telephone customer. Unlike cable, a telephone customer cannot choose from a menu of programming selections; one simply acquires a mechanism (the telephone) capable of receiving all available messages. Congress, accordingly, found that the "customer requested blocking of telephone . . . approach was deficient [because] [i]t placed the onus for preventing access to dial-a-porn on the telephone subscriber." 134 Cong. Rec. H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley).

For the foregoing reasons, in this novel case dealing with regulation of a new technology, this Court should decide that dial-it services are closer to regulated broadcast outlets than they are to traditionally unregulated common carriers or other media. The technological features of dial-it services intend to reach a mass audience, available every moment of every day. Telephones are pervasive, the services offered are intrusive and uninvited, and every child learns at an early age to use a telephone, if only to be able to dial his or her home or an emergency number. These factors taken together indicate that the Court's holding in *FCC v. Pacifica Foundation* applies here. For the reasons offered in *Pacifica*, the extension of regulatory authority to the dial-it technology to ban dial-a-porn is constitutional.

B. Congressional Consideration of Constitutional Implications of Regulatory Alternatives Was Reasoned and Entitled to Deference.

Telephone services do not distinguish the age of the caller, but only record that a call was made. Thus to be available to adults, dial-a-porn must necessarily be available to children. *Cf. Pacifica*, 438 U.S. at 758-59 (Powell, J., concurring in part). Congress in fact determined that no blocking mechanism, including a customer premises "lock-box," was technologically or constitutionally feasible in the dial-a-porn context:

> Mr. Speaker, I supported the initial effort to provide conferees with the latitude necessary to arrive at a content-neutral, technological solution. After 4 months of negotiations between the various staffs and groups concerned with this issue, it became clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material.

134 Cong. Rec. H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley).

The ineffectiveness of the proffered technical "fix" is very important when the Court weighs the aggressive marketing of the services [23] and the harm that could occur to children.[24] After-the-fact action by parents cannot undo the harm or limit its implications for the future. As the Court recognized in *FCC v. Pacifica Foundation*, turning off the message after it is heard is too late—

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[23] Leafletting and other means of marketing are readily available to adolescents. Because they are not mature or responsible enough to consider the implications, adolescents have exhibited a certain ingenuity in seeking access to dial-a-porn "services." *Cf. Ginsberg v. New York*, 390 U.S. at 649-50 (Stewart, J., concurring). First amendment protections presuppose the capacity to choose responsibly. *Id.* Because the service is available anywhere, anytime, the ability of a parent to monitor choices and access is difficult.

[24] *See, e.g.*, note 21, *supra*.

a factor that weighed heavily in the Court's treatment of that case. 438 U.S. at 748-49.[25] Given the longstanding legislative role in reviewing and enacting measures designed both to protect children and enhance the parental role in formation and education, the statutory ban was not only warranted but the only choice available to preclude the adverse consequences of dial-a-porn to children.

Congress' judgment that the risk of serious harm to children from access to dial-a-porn was so great that the dial-it mechanism should not carry these salacious messages was made after deliberately weighing the constitutionality of the measure. In its 1987 hearings, it heard discussions of the applicability of *Pacifica* and other relevant decisions to its proposed action. *Telephone Decency Hearings* at 29-30, 86-89, 114, 131, 216-17, 229. The texts of some cases were even included in the record. *Id.* at 135-185. The principal sponsor, Representative Bliley, specifically announced that the measure was the result of deliberations that "take into consideration Supreme Court decisions with regard to obscene and indecent speech." 134 Cong. Rec. H1691 (daily ed. April 19, 1988). Legal memoranda supporting and questioning the measure's constitutionality were included in the record. 134 Cong. Rec. S4378 (daily ed. April 20, 1988) (supporting); *Telephone Decency Hearings* at 70 (supporting); *id.* at 32 (questioning).

Where Congress specifically considers the constitutionality of a legislative measure, finds it constitutional, and enacts it, that finding is entitled to great weight. *Bowen*

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[25] Justice Stevens' majority opinion quite brusquely dismisses the point: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." *FCC v. Pacifica Foundation*, 438 U.S. at 748-49 (footnote omitted).

v. Kendrick, 108 S.Ct. 2562, 2578-79 (1988); *Rostker v. Goldberg*, 453 U.S. at 64. This deference has its roots in constitutional separation of powers. *Cf. Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947). It is the task of the legislative branch to examine the evidence, reconcile differences, evaluate alternatives, and propose solutions. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). It is not the province of the judiciary to frustrate the legislative will because the law "may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." *Otis v. Parker*, 187 U.S. 606, 608 (1903); B. Cardozo, *The Nature of the Judicial Process* 141 (1921). In the instant case, that kind of legislative judgment is subrogated by the district court. This Court should adhere to the views expressed in *Columbia Broadcasting System v. Democratic National Committee*, "that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem." 412 U.S. 94, 103 (1973). In a close case—and this is one—in which the application of law is to a novel technology and in which the consequences of a wrong choice may be devastating to children and to the protected interests of their parents, no judgment of unconstitutionality should be possible.

CONCLUSION

For the foregoing reasons, the judgment of the district court invalidating the statutory ban on access to indecent speech through dial-a-porn telephone service should be reversed.

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